THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-40-07254
Appellate Case No. 2016- 001710

Andrew P. Neumayer, ... Respondent,

v.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn Knox
DeMartelare, and Asia N. Partman, ... Defendants,

of whom
Philadelphia Indemnity Insurance Company is .... Appellant.

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. Did the Circuit Court Err in Ruling That under South Carolina Law PIC's Notice Provision Did Not Operate to Preclude Coverage for Payment of the Entirety of Plaintiff's Judgment Against PIC's insureds?

II. Did the Circuit Court Err in Ruling That the "Notice Clause" under PIC's Policy Conflicts with Section 38-77-142 of the South Carolina Code and is Therefore Void?

COUNTER-STATEMENT OF THE CASE

On December 4, 2015, Plaintiff Andrew P. Neumeyer sued Philadelphia Indemnity Insurance Company ("PIC"), Primary Colors Child Care Center (the "Center"), Jocelyn Knox DeMartelare and Asia N. Partman. Plaintiff sought an order declaring that an insurance policy PIC issued to the Center provided coverage for a tort judgment of $622,500.00 Plaintiff obtained against the Center, its owner DeMartelare and Center employee Partman.

On January 15, 2016, PIC filed an answer asserting its indemnification obligation under its policy was limited to $25,000.00 because its insured violated the Policy's "notice" clause. PIC also filed a cross-claim against DeMartelare and Partman ("Insureds"). On January 30, 2016, Plaintiff filed a reply to PIC's counterclaim denying PIC's assertions.

On April 14, 2016, Plaintiff moved for summary judgment on the ground that under South Carolina law PIC may not limit the coverage available under the policy to $25,000.00. On May 13, 2016, PIC filed a cross-motion for summary judgment, agreeing with Plaintiff as to the basic facts of the matter but asserting the "notice" clause under the policy limited its obligation to $25,000.00.

On June 13, 2016, the circuit court entered an order finding the "notice" clause was not enforceable. The court denied PIC's motion and granted Plaintiff's motion for summary judgment. On June 23, 2016, PIC moved the court to alter or amend the judgment. PIC contended the court misapprehended its position that it owed no duty to indemnify under the plain language of the policy but that under South Carolina case law PIC had to provide coverage at the minimum limits required by law.

On August 2, 2016, the circuit court entered an amended order addressing more completely the parties' arguments but adhering to its prior ruling.

This appeal follows.

FACTS

The basic facts are not in dispute. On January 25, 2013, Plaintiff was a pedestrian on a street in Cayce, South Carolina. Partman was operating a bus owned by DeMartelare's business, the Center. Partman struck Plaintiff, who was severely injured. Plaintiff's medical bills exceeded $122,000.00.

On November 8, 2013, Plaintiff sued Partman, DeMartelare and the Center for negligence in Partman's operation of the bus. Plaintiff served the Center but the Center defaulted by failing to appear or otherwise respond. The circuit court (Judge Barber) scheduled a damages hearing for April 3, 2014 and the Center failed to appear despite proper notice of the hearing. The circuit court heard testimony and evidence and on April 7, 2014, entered judgment against all defendants for $622,500.00. (Complaint Exh.).

At the time of Plaintiff's injury PIC had issued a Commercial Lines Policy (the "Policy") to the Center as the named insured. (PIC Answer Exh.). The policy provided automobile liability insurance coverage limits of $1,000,000.00. (PIC Answer, ¶ 6; PIC Answer Exh. p. 2). The Policy also contained the following provision:

SECTION IV – BUSINESS AUTO CONDITIONS

* * *

2. Duties in the Event of Accident, Claim, Suit or Loss

> We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:
>
> a. In the event of "accident", claim, "suit" or "loss", you must give us or our authorized representative prompt notice of the "accident" or "loss"....
>
> * * *
>
> b. Additionally, you and any other involved "insured" must:
>
> * * *
>
> (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".

(PIC Policy).

On October 21, 2015, Plaintiff presented the judgment to PIC but PIC refused to satisfy the judgment, asserting the Center's lack of cooperation in failing to provide timely notice of the suit permitted PIC to deny any payment. PIC agreed, however, that under South Carolina case law PIC was liable for at least the statutory minimum liability limits coverage of $25,000.00.

Plaintiff then brought this declaratory judgment action seeking an order requiring PIC to satisfy the judgment in full. PIC answered and counterclaimed, asserting that the policy provision relieved PIC entirely from payment, although PIC was liable for only $25,000.00 under case law. PIC also cross-claimed against DeMartelare, Partman and the Center for a declaratory judgment that PIC's maximum exposure in this matter was $25,000.00.

Plaintiff and PIC filed cross-motions for summary judgment. The circuit court heard argument on May 18, 2016 and on June 13, 2016, granted Plaintiff's motion while denying

PIC's motion. PIC timely requested reconsideration and on August 2, 2016, the circuit court entered an amended order, ruling:

1. The central issue was whether PIC could properly reduce the available coverage to the statutory minimum of $25,000.00 through a cooperation provision in the Policy. (Amended Order p. 3);
2. South Carolina automobile insurance law significantly changed in 1999 when S.C. Code Ann. § 38-77-142 became effective.
3. Section 38-77-142 (C) provides "Any endorsement, provision, or rider attached to or included in any policy of insurance which purports or seeks to limit or reduce the coverage afforded by the provisions required by this section is void." (Amended Order p. 4)
4. Section 38-77-142 mandates that automobile insurance policies are required to have provisions affording coverage for named insureds and their permissive operators and any relevant policy provision which effectively reduces coverage is void. (Amended Order, pp. 3-4).
5. PIC's policy provision reduces coverage available under the Policy and violates Section 38-77-142(C), as supported by *Williams v. Gov't Employees Ins. Co.*, 409 S.C. 586, 762 S.E.2d 705 (2014), specifically the Court's statements that "it is the face amount of the coverage that is relevant under § 38-77-142, not the statutory minimum limits of liability coverage set forth in § 38-77-140, which are not even mentioned in the statute" and "the clear terms of section 38-77-142 are controlling of this state's public policy and justify the result we reach today." (Amended Order

p. 4).

6. Under the plain language of Section 38-77-142 and *Williams*, "coverage in auto liability policies cannot be reduced by this or any such provision, and the statutory minimum is irrelevant." (Amended Order, p. 4).

7. "If [PIC] has an indemnification obligation, then its obligation extends to the limits of coverage on the Policy." (Amended Order, p. 4)

8. *USAA v. Markosky*, 340 S.C. 223, 530 S.E.2d 660 (Ct. App. 2000) involved a wreck that occurred prior to March 1, 1999, the effective date of Section 38-77-142, and therefore did not control per *Williams*, at 602, 762 S.E.2d at 714. (Amended Order p. 5).

9. "A plain reading of § 38-77-142 (C) clearly mandates that any relevant provision in any automobile insurance policy attempting to reduce the coverage available is void." (Amended Order p. 5).

10. PIC's provision violates Section 38-77-142 by attempting to reduce the coverage available under the Policy. The provision is therefore void and unavailable to PIC. "Section 38-77-142 (C) prevails." (Amended Order p. 5).

The circuit court therefore granted summary judgment for Plaintiff and denied PIC's motion for summary judgment. (Amended Order p. 5).

ARGUMENTS

The narrow issue in this case is whether PIC's Policy provision requiring notice of an action permits it to avoid providing any coverage for Plaintiff's injuries, except at the statutory minimum limit of $25,000.00 as required by South Carolina case law. The circuit court held enforcement of the provision would result in reducing the coverage available under the Policy in violation of Section 38-77-142(C) as described in *Williams v. GEICO*. This Court should affirm that ruling.

I. The Circuit Court Correctly Ruled That under South Carolina Law PIC's Notice Provision Did Not Operate to Preclude Coverage for Payment of the Entirety of Plaintiff's Judgment Against PIC's Insureds

PIC makes three brief arguments here. First, PIC contends the Center's compliance with the notice provision was a condition precedent to any coverage under the Policy. (App. Br. pp.11-12). Second, PIC argues coverage was not triggered at all under the Policy due to the failure by the Center and Partman to comply with the notice provision. (App. Br. pp. 13-14). Finally, PIC asserts that even though there is no coverage available under the Policy's terms, pursuant to South Carolina case law the coverage available is $25,000.00 but no more. (App. Br. pp. 14-15). The Court should not be persuaded by these arguments.

A. Compliance with the Notice Provision Is Not a "Condition Precedent" to Coverage

PIC argues that compliance with the Policy's notice provision is a "condition precedent" to all coverage. (App. Br. p. 12). PIC cites to two South Carolina cases from the mid-1960s as well as cases from foreign jurisdictions. (App. Br. p. 12 and n. 3). The Court

should reject this argument.

PIC quotes from *Squires v. National Grange Mut. Ins. Co.*, 247 S.E.2d 58, 145 S.E.2d 673 (1965) and *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 137 S.E.2d 608 (1964) that "It is well settled that, unless waived by the insurer, the failure of an insured to comply with policy provisions as to notice or forwarding suit papers, which are by the terms of the contract made conditions precedent to liability, will bar recovery." (App. Br. p. 13). PIC's argument is that under *Squires* and *Hatchett*, PIC owed no duty to respond to Plaintiff's judgment at all. The Court should not be persuaded by these cases.

The facts in *Hatchett* occurred in 1962, prior to the enactment of the South Carolina Automobile Reparation Reform Act of 1974. *See Shores v. Weaver*, 315 S.C. 347, 351, 433 S.E.2d 913, 915 (Ct. App. 1993) (noting the Act was passed in 1974). Furthermore, *Hatchett* involved a claim for uninsured motorist (UM) coverage under a voluntary insurance contract. The contract provided expressly "No action shall lie against the Company unless, as a *condition precedent* thereto, the Insured or his legal representative has fully complied with all the terms of this endorsement." *Hatchett*, at 429, 137 S.E.2d at 610 (emphasis added). The insured obtained a default judgment against the at-fault uninsured motorist and then sued his own insurer, Nationwide, for refusing to pay the judgment when proffered. Nationwide had refused based upon the "condition precedent" language in the UM endorsement.

The circuit court found for the insured and Nationwide appealed. The Supreme Court noted the insured claimed the "condition precedent" clause, which incorporated "proof of claim" and "notice of legal action" clauses, violated the UM statute that existed at the time. The Supreme Court disagreed. The Court noted that in 1963 the legislature amended the UM

statute to provide:

> * * * No action shall be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing such liability are served in the manner provided by law upon the insurance carrier writing such uninsured motorist provision. The insurance carrier may appear and defend in the name of the uninsured motorist in any action which may affect its liability, and shall have twenty days after service of process on it in which to make such appearance. The evidence of service upon the insurance carrier shall not be made a part of the record.

Hatchett, at 433, 137 S.E.2d at 612. The Court found this amendment corrected a "defect" which left the statute silent as to the procedure available to an insurance company to defend a claim under the UM endorsement provision of the policy. The Court held the UM statute was never intended to hold an insurance company liable without notice or opportunity to investigate or contest the UM claim. The Court found the policy provisions were not in conflict with the terms of the existing Act and were valid. *Hatchett* at 434, 137 S.E.2d at 612. The Court stated:

> The policy provisions, which we have held to be valid, required, as conditions precedent to any right of recovery by the insured, that notice of claim under the uninsured motorist endorsement be given to the company as soon as practicable, and that upon the commencement of legal action a copy of the summons and complaint be forwarded to the insurer immediately.

Id. The Court held that the insured's failure to comply with policy provisions in his *own* insurance contract as to notice or forwarding suit papers, which were "by the terms of the contract made conditions precedent to liability," barred recovery. *Hatchett*, at 435, 137 S.E.2d at 613.

Hatchett is of limited force in this matter. The case involved: (1) an application of the early 1960s UM statute which predated the enactment of wholesale mandatory

automobile insurance in South Carolina by nearly a dozen years; (2) an insured seeking to recover under his own policy; and (3) an express policy provision describing notice of a claim as a "condition precedent" to recovery under the UM endorsement. In this case a third-party injured person seeks recovery under the current insurance laws as set forth by the General Assembly and as construed by relevant case law.

Squires is likewise of limited use. *Squires* quoted from *Hatcher* for the rule PIC set forth in its brief. *Squires* also involved an insured's claim under an uninsured motorist provision in his own policy upon facts that took place in 1961, over a dozen years before enactment of the mandatory automobile insurance system in this State. The insured in *Squires* was able to recover because the at-fault driver was initially insured but was deemed uninsured at a later date, and the insured sent the pleadings to his own insurer "as soon as practicable" after learning of the uninsured status of the at-fault.

The key to both *Hatchett* and *Squires* was application of a contract provision that set forth express "conditions precedent" against claims by the policy's own insured against coverage. Under the UM statute that existed at the time, the insured's failure to give notice required by his own contract with his own insurer would have precluded his recovery under his own policy. Each of these cases is distinct from the case before the Court in very meaningful ways.

The same is true of every foreign case PIC cites in a footnote in its brief. (App. Br. p. 14, n. 4). For instance, *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999) involved a claim by an insured against his *own* ERISA-based long-term group disability policy issued by UNUM. The United States District Court held California's "notice/prejudice" rule fell

under ERISA's pre-emption clause and was thus inapplicable. The Ninth Circuit reversed, and the US Supreme Court agreed with the Ninth Circuit. In its opinion, the Supreme Court stated, "Insurance policies *like UNUM's* frame timely notice provisions as conditions precedent to be satisfied by the insured before an insurer's contractual obligation arises." *Id.*, at 369 (emphasis added). PIC cited the case for this language, but conspicuously omitted the emphasized words "like UNUM's." Importantly, the Supreme Court concluded:

> In sum, the Ninth Circuit properly concluded that notice-prejudice is a rule of law governing the insurance relationship distinctively. We reject UNUM's contention that the rule merely restates a general principle disfavoring forfeitures and conclude instead that notice-prejudice, as a matter of common sense, regulates insurance.

UNUM, at 373. At bottom, *UNUM* does not advance the analysis applicable to this case, that is, whether an at-fault insured who fails to forward the papers may prejudice the ability of a third party injured by that insured to claim against the at-fault's liability policy.

Maryland Cas. Co. v. W.R. Grace & Co.-Conn., No. 88-CIV-4337-JSM, 1994 WL 167962 (S.D. N.Y. Apr. 29, 1994) is also not helpful. This case is an unpublished order from the United States District Court and involved the duty of an insurer to defend regulatory actions brought against its insured, W.R. Grace. The district court did not say what type of policy was involved but it appears to have been a CGL policy covering liability for environmental claims against W.R. Grace. In any event, the case involved a dispute between the insurer and its own insured, and the issue of whether the insured had given appropriate notice under the policy to trigger the duty to defend the insured. *Maryland Casualty* is therefore distinct from this case in very meaningful ways.

Likewise *Country Mut. Ins. Co. v. Livorsi Marine, Inc.*, is not helpful. 833 N.E.2d

871 (Ill. Ct. App. 2004), *affirmed* 856 N.E.2d 338 (2006). *Livorsi Marine* involved a claim under a general liability insurance policy for a defense to a trademark lawsuit. The Illinois appellate court noted:

> This insurance coverage case raises a question that has not been squarely answered in this State: When an insured is required by its contract with its insurer to give timely notice of a lawsuit against it, but does not do so and has no excuse for not doing it, does the insurer have to prove prejudice before it can avoid coverage? We conclude this insurer did not have to prove it was prejudiced by an unreasonably late notice of a lawsuit.

Id., at 81-882. This holding alone distinguishes the case from South Carolina law. Furthermore, the dispute in *Livorsi Marine* was between the insurer and its own insured and involved whether the insurer owed a duty to defend the insured; the case did not involve statutory insurance coverage.

In *Colonial Ins. Co. v. Barrett*, 542 S.E.2d 869 (W. Va. 2000), the narrow issue was whether a notice of suit provision in an automobile liability policy may be satisfied when the insurer receives notice of the suit from the injured party rather than its own insured. The Supreme Court of West Virginia held that it may. Importantly, the Court was not construing the effect of a statute similar to Section 38-77-142 or the rules similar to those set forth in *Shores v. Weaver* and *Williams v. GEICO.*

State Farm Mut. Auto. Ins. Co. v. Porter, 272 S.E.2d 196 (Va. 1980) involved application of the following specific Virginia statutory provision to all terms of the automobile insurance contract:

> (a1) Nor shall any such policy ... be so issued ... unless it contains an endorsement or provision insuring the named insured and any other person responsible for the use of ... the motor vehicle ... notwithstanding the failure or refusal of the named insured or such other person to cooperate with the

> insurer under the terms of the policy; *provided, however, that if such failure or refusal prejudices the insurer in the defense of an action for damages arising from the operation or use of such motor vehicle, then this endorsement or provision shall be void.*

Porter at 199 (emphasis added). This provision does not exist under South Carolina's automobile insurance code. The closest provision under South Carolina's code provides:

> * * * If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations *to the insured*, provided the insured otherwise cooperates and in no way prejudices the insurer.

S.C. Code Ann. § 38-77-142(B) (1997) (emphasis added). Thus, the failure to cooperate affects *only* the obligation the insurer owes to its insured and no one else. *Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 629, 594 S.E.2d 275, 277 (2004) ("In plain and ordinary terms, this sentence in § 38-77-142(B) governs only the relationship between an insurer and its insured."). Importantly, unlike the Virginia statute, South Carolina's statute does *not* declare the failure to cooperate voids the coverage entirely.

Finally, *Kolibczynski v. Aetna Life and Cas. Co.*, 410 A.2d 485 (Conn. 1979) involved a dram shop claim against a restaurant under a commercial premises liability policy. The case did not involve a claim under a statute governing the terms of automobile liability insurance or any provision similar to Section 38-77-142. The statement by the Connecticut court regarding an insured's duty to forward suit papers as a "condition precedent" to the insurer's duty to defend therefore is not persuasive in this matter.

The Court should reject PIC's argument that under South Carolina law compliance with the notice provision is a "condition precedent" to any coverage.

B. PIC's Argument that Coverage was Not Triggered At All is Wrong

In a one-paragraph argument, PIC contends that because the Center and Partman failed to comply with the notice clauses, those clauses are conditions precedent to coverage, and because PIC suffered "substantial prejudice" as a result, "coverage under the Policy was never triggered." (App. Br. pp. 13-14). These assertions are contrary to the language of Section 38-77-142 and the holdings of *Shores v. Weaver*, *Cowan v. Allstate*, and *Williams v. GEICO*. This Court should reject PIC's contention out of hand.

First, PIC contends summarily that it suffered prejudice. (App. Br. p. 14, n. 4). PIC does not proffer any defense it might have had to Plaintiff's claims against the Center, Partman or DeMartelare, nor does it assert the assessment of damages was excessive. Although PIC provided an affidavit by its employee Kevin Gray that PIC "was deprived of its right to conduct a reasonable investigation of [Plaintiff's] allegations and defendant against the Tort Action," (Gray Aff. p. 2, ¶ 5), Mr. Gray does not assert that the Center had any defense of merit to either liability for Plaintiff's claim or the amount of Plaintiff's damages.

Second, under *Shores v. Weaver*, the at-fault insured's failure to forward the suit papers will not affect the injured third-party's ability to make a claim under the at-fault insured's liability policy. The failure to give notice will most certainly impact the relationship between the insurer and its own insured, and might relieve the insurer of any duties to its own insured as set forth in Section 38-77-142(B). But that failure will not affect the insured's obligation to provide coverage as set forth in the Policy to the innocent third-party injured by the insured.

C. Coverage Is Not Limited to $25,000.00 under South Carolina Law

PIC reiterates "[b]ased solely on the terms of the Policy, no coverage is available for the Underlying Action whatsoever." (App. Br. p. 14). PIC argues that under case law "mandatory minimum coverage under a motor vehicle liability insurance policy may not be voided for an innocent third party due to an insured's breach of a policy condition." (App. Br. p. 14). PIC points out that under Code Section 38-77-140(A)(1), the mandatory minimum is currently $25,000.00. (App. Br. p. 14). PIC contends this means it must provide coverage under the Policy of $25,000.00, "but no more." (App. Br. p. 14). The Court should not be persuaded by this argument.

PIC relies primarily upon *United Services Auto. Ass'n v. Markosky*, 340 S.C. 223, 530 S.E.2d 660 (Ct. App. 2000) to support its argument. *Markosky*, however, does not control.

The time-line here is important. In 1993, the Court of Appeals held that with the enactment of the Automobile Reparation Reform Act in 1974, South Carolina became a mandatory automobile insurance state. *Shore v. Weaver*, 315 S.C. 347, 351-352, 433 S.E.2d 913, 915 (Ct. App. 1993). The Court of Appeals described the public policies underlying the Act and held "in accordance with the public purpose of protecting innocent third parties through mandatory insurance Weaver's violation of a provision in the policy providing this mandatory minimal coverage did not defeat or void that coverage." *Shores*, at 355, 433 S.E.2d at 917. The Court concluded:

> [W]e hold, as a matter of public policy, the minimum limits automobile liability insurance policy involved in this case was not defeated or voided by Weaver's failure to comply with policy notice provisions after the accident resulting in Johnson's injuries, because the coverage was mandated by the legislature to protect innocent third parties, such as Johnson.

Id., at 356, 433 S.E.2d at 917.

About four years after *Shores*, the legislature enacted § 38-77-142, effective March 1, 1999. *See Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 628, 594 S.E.2d 275, 277 (2004) (noting this fact).

The next case to address this issue was *Markosky* (decided in 2000) in which the Court of Appeals described the holding of *Shores* to be:

> as a matter of public policy, that a minimum limits automobile liability insurance policy was not defeated or voided by the insured's failure to comply with policy notice provisions after the accident, because the coverage was mandated by the legislature to protect innocent third parties.

Markosky, at 227-228, 530 S.E.2d at 663. The Court then found persuasive North Carolina statutory and case law that permitted enforcement of a notice provision as to amounts in excess of minimal limits. The Court concluded:

> In this case, the parties agreed Frazier failed to comply with the policy's terms and conditions, resulting in substantial prejudice to State Farm. We find no conflicting statutory provision overriding State Farm's authority to avoid coverage in excess of the statutory minimum limits under these circumstances. Therefore, we hold State Farm owes no further coverage under the policy.

Id., at 230-231, 530 S.E.2d at 664.

Importantly, the wreck in *Markosky* occurred in 1994 and the action was brought in 1995. The Court of Appeals acknowledged changes in the automobile insurance law effective in 1999 and noted "therefore, our treatment of this argument [that liability coverage in excess of the statutory minimum limits is, in effect, mandatory from the perspective of the insurer] is necessarily limited to the facts of this case." *Id.* at 230, n. 2, 530 S.E.2d at 664, n. 2.

The next case to address this issue was *Cowan v. Allstate Ins. Co.*, 351 S.C. 626, 571

S.E.2d 715 (Ct. App. 2002) (*Cowan I*). In *Cowan*, the circuit court held Allstate could assert its insured's failure to comply with the cooperation clause of the insurance policy to deny coverage for a default judgment Cowan obtained against the insured when Allstate lacked actual knowledge of the lawsuit. The Court of Appeals affirmed, stating Section 38-77-142(B) modified *Shores*. The Court distinguished *Markosky* because the accident in *Markosky* occurred before the effective date of Section 38-77-142. The Court of Appeals also held the statute could not have been intended to expand *Markosky* because the statute "was enacted in 1997, before *Markosky* was decided, though it did not take effect until 1999." *Cowan I* at 630, 571 S.E2d at 717.

The Court of Appeals then found implicit in Section 38-77-142 the legislature's intent "to allow an insurer to enforce a cooperation clause if neither the insured nor the innocent victim provided the insurer with notice of the lawsuit." *Id.*, at 632, 571 S.E.2d at 718. The Court added its view that "the primary policy undergirding the *Shores* holding has also been changed by statute," referring to the passage of Section 56-10-510, which the Court perceived as changing South Carolina from a mandatory to a voluntary insurance state. *Id.*, at 632-633, 571 S.E.2d at 718. The Court held "that an insurer who has no actual notice of a complaint or motion for judgment having been served on an insured and with whom the insured fails to cooperate to the prejudice of the insurer can rely on its cooperation clause to deny a claim...." *Id.* at 633, 571 S.E.2d at 718-719.

The Supreme Court granted review and reversed. *Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 594 S.E.2d 275 (2004) (*Cowan II*). The Supreme Court stated:

> We disagree with the Court of Appeals' interpretation of §

> 38-77-142(B). In plain and ordinary terms, this sentence in § 38-77-142(B) governs *only the relationship between an insurer and its insured.* It provides that despite an insured's failure to comply with a cooperation clause requiring him to forward pleadings, *the insurer must honor all its obligations under the policy* if it has actual notice of those pleadings. The sentence also provides that if the insured fails to cooperate in other ways to the prejudice of the insurance company, those acts may relieve the company "of its obligation to the **insured**."
>
> *Our construction of the sentence involves only the two entities named in it: the insured and the insurer.* The trial court and the Court of Appeals exceeded the bounds of statutory construction when they inverted the statute and interpolated the term 'third party' into it. Further, by its terms, the statute is intended to deal with an insured's "mere failure ... to turn the motion or complaint over to the insurer...." By providing that actual notice is sufficient, the statute effects a "common sense" resolution where, for example, an insured notifies its insurer by phone, but neglects to forward the pleadings.

Cowan II, at 629, 594 S.E.2d at 277 (bold by the Court; italics added). The Supreme Court concluded Section 38-77-142(B) did not impact the holding in *Shores*. Notably, the Supreme Court did not reference *Markosky* at all in its decision.

The next case in the time-line is *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012). *Rhoden* addressed a different issue but is notable as this was the first time the Supreme Court referenced *Markosky*. The Court cited *Markosky* for the rule that "freedom of contract is subordinate to public policy[, and] agreements that are contrary to public policy are illegal." *Id.* at 398, 728 S.E.2d at 480 (citing *Markosky* with the parenthetical remark "[I]nsurers have the right to limit their liability and impose whatever conditions they desire upon an insured, provided they are not in contravention of some statutory inhibition or public policy.").

The final relevant case in the time-line is *Williams v. Gov't Employees Ins. Co.*, 409 S.C. 586, 762 S.E.2d 705 (2014). In *Williams*, the circuit court upheld a family step-down

provision in the policy that reduced coverage for bodily injury to family members from the stated limit of $100,000 to the statutory minimum amount mandated by South Carolina law during the policy period. The Supreme Court reversed that portion of the ruling.

The Court cited to *Markosky* for only the second time and noted *Markosky* involved an accident that occurred prior to the effective date of Section 38-77-142 and thus was "not controlling." *Williams*, at 602, 762 S.E.2d at 714. The Court then stated:

> In viewing the plain wording of section 38–77–142, we find subsections (A) and (B) require a policy for liability insurance to contain a provision insuring the named insureds and permissive users against liability for damage incurred "*within the coverage of the policy.*" Subsection (B) additionally contains a provision regarding notice that states the mere failure to turn over a motion or complaint will not void coverage. Finally, subsection (C) provides that no policy provision may limit or reduce the coverage required by this section, which refers to section 38–77–142, or else it is void.
>
> We think it is significant that section 38–77–142 provides insurers must provide liability coverage to insureds "within the coverage of the policy" and may not limit or reduce liability *coverage in the policy* below the amount provided in this section, meaning section 38–77–142. Thus, *it is the face amount of the coverage that is relevant under section 38–77–142, not the statutory minimum limits of liability coverage set forth in section 38–77–140,* which are not even mentioned in the statute. In contrast to the circuit court's interpretation, we believe the General Assembly could have simply stated coverage may not be reduced below the statutory minimum limits and/or below the amount provided in section 38–77–140, if that was its intent. However, it did not do so. Here, the circuit court has engrafted an additional restriction into section 38–77–142 that was not included by the General Assembly by determining coverage may be reduced to the statutory minimum, in direct contravention to the explicit language of section 38–77–142(C) that coverage may not be reduced below the coverage in the policy.

Id., at 603, 762 S.E.2d at 714 (emphasis added). The Court then discussed Section 38-77-142(C) and stated:

> Therefore, *once the face amount of coverage is agreed upon, it may*

> *not be arbitrarily reduced or limited by conflicting policy provisions that effectively retract this stated coverage*. Any other interpretation of section 38–77–142(C) would render the section useless, and the General Assembly is presumed not to perform useless acts. *See Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something." (citing *TNS Mills, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 611, 503 S.E.2d 471 (1998))). After agreeing on a policy with $100,000 in stated liability coverage for the named insureds, GEICO should not be permitted to subsequently reduce it with what it deems an "exclusion" in the policy.

Id. at 604, 762 S.E.2d at 715 (emphasis added). The Court found:

> [T]he clear terms of section 38-77-142 are controlling of this state's public policy and justify the result we reach today. In this case, the Murrys, the named insureds, purchased a policy with liability coverage limits of $100,000 per person and $300,000 per accident for bodily injury, and $50,000 per accident for property damage. In our view, GEICO has improperly attempted to reduce the coverage in the policy to the named insureds by means of the step-down provision, which it has characterized as an "exclusion." We find this provision is in direct contravention to the prohibition set forth in section 38–77–142. In addition, to allow an insurer to determine the extent to which an injured party can recover within the insured's policy coverage based solely on a familial relationship is arbitrary, capricious and injurious to the public good. [citation omitted] For these reasons, the family step-down provision is void as against the public policy of this state.

Id., at 606, 762 S.E.2d at 716-717.

These cases establish the following. In *Shores*, the Court held that public policy precluded an insurer from refusing to cover injuries sustained by an innocent third-party because the insured failed to turn over the papers. *Markosky* then held the *Shores* analysis limited recovery to the statutory mandatory minimum – that portion of *Markosky* has never been cited with approval by the Supreme Court. The Court of Appeals next decided *Cowan I* in which the Court of Appeals held that Section 38-77-142 "modified" *Shores* and that an

insurer could avoid a third party's claim where it had no notice of the claim, but in *Cowan II* the Supreme Court reversed that ruling (without citing to *Markosky*), held *Shores* was still good law, and added that while Section 38-77-142(B) permitted an insurer to avoid duties to its own insured where there was non-cooperation, the statute did not affect the insurer's duty to the innocent injured party. Finally, *Williams* establishes that a term that attempts to limit the face value of the coverage stated in the policy is void, and that under section 38-77-142 it is that amount and not the mandatory minimum amount under Section 38-77-140 that is relevant.

Thus, contrary to PIC's argument, the circuit court did not err in finding that PIC is obligated to provide coverage under the face amount of the policy rather than the statutory minimum coverage set forth in Section 38-77-140.

II. The Circuit Court Correctly Ruled That the "Notice Clause" under PIC's Policy Conflicts with Section 38-77-142 of the South Carolina Code

PIC contends the circuit court ruled that notice clauses are void and unenforceable per se under Section 38-77-142 and *Williams v. Gov't Employees Ins. Co.* (App. Br. p. 15). PIC overstates the circuit court's holding, and insists that this Court ignore the plain language of Section 38-77-142. The Court should not be persuaded by these arguments.

PIC returns to its earlier argument that "coverage under the Policy was never triggered in the first place" because the Center and Partman "did not comply with the notice clauses, which are conditions precedent to coverage." (App. Br. p. 16). As set forth above, PIC's argument here is simply wrong.

As discussed in Parts I (A) and (B), above, under South Carolina law, the insured's failure to give notice of the claim does not preclude coverage under the Policy pursuant to both Section 38-77-142 and the relevant case law. In the interest of brevity Plaintiff would simply point the Court to that earlier discussion and incorporate it here.

PIC contends the circuit court's order violates the statement in *Cowan II* that Section 38-77-142(B) did not impact the holding in *Shores* and "effectively transforms motor vehicle carriers into sureties." (App. Br. p. 16). This is not so. What the Supreme Court meant in *Cowan II* was that the statute did not overturn the principles underlying *Shores* as the insurer argued in *Cowan I.* The Court was not addressing any argument about whether the legislature *expanded* the holding in *Shores* by enacting Section 38-77-142. PIC's contention here reads too much into the Supreme Court's decision in *Cowan II.*

PIC next asserts the circuit court's order renders a portion of Section 38-77-142

"superfluous." (App. Br. p. 17). This argument ignores the express language of *Cowan II* in which the Supreme Court noted this language controls only the relationship between the insurer and its own insured, and not the statutory duties owed to innocent third parties injured by the insured.

PIC contends that the analysis discussed in *Williams* has "no application" in this case, again contending "coverage for the Underlying Action was never initially triggered due to the failure of [the Center] and Partman to comply with the Notice Clauses." (App. Br. p. 18; see also p. 19). Again, this argument ignores that under South Carolina law, the failure of an insured to forward the papers will not, as a matter of public policy, prevent coverage under the policy from being "triggered." And Section 38-77-142 requires the insurer to address those claims at the limit stated in the policy, not the minimum limits set forth by Section 38-77-140. *Williams*.

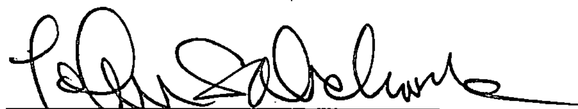
The Court should not be persuaded by PIC's hyperbolic argument that the circuit court declared all notice clauses to be invalid under Section 38-77-142. The circuit court's decision honors the plain language of the statute as well as the holdings in *Shores*, *Cowan II*, and *Williams*. This Court should affirm.

CONCLUSION

For the reasons stated the Court should affirm the circuit court's ruling.

Respectfully submitted,

February 21, 2016



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-40-07254

RECEIVED
FEB 21 2017
SC Court of Appeals

Andrew P. Neumayer, ... Respondent,

v.

Philadelphia Indemnity Insurance Company,
Primary Colors Child Care Center, Jocelyn Knox
DeMartelare, and Asia N. Partman, ... Defendants,

of whom

Philadelphia Indemnity Insurance Company is .... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Motion for the Court to Accept the Initial Brief of Respondent Out of Time* and the conditionally filed *Initial Brief of Respondent* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Curtis W. Dowling
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Barnes Alford Stork & Johnson, LLP
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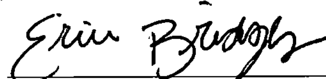

February 21, 2017

Erin Bridges

BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

February 21, 2017

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Andrew P. Neumayer v. Philadelphia Indemnity
Case Tracking No. 2016-001710

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FEB 21 2017
SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a Motion for the Court to Accept the Initial Brief of Respondent Out of Time. Also, please find enclosed the conditionally filed original and one (1) copy of the Initial Brief of Respondent. I have also enclosed a proof of service upon counsel for the Appellant and a check in the amount of $25.00 for filing this motion. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: Gerald E. Reardon, Esquire
Curtis W. Dowling, Esquire
Matthew G. Gerrald, Esquire